Supreme Court, U.S.
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No. _____ 98 675

In The
Supreme Court of the United States
October Term, 1998

WESLEY G. HARLINE, M.D., a licensed physician,
Petitioner,
vs.
UNITED STATES DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT ADMINISTRATION,
an agency of the United States Government, et al.
Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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89 pp

QUESTION PRESENTED FOR REVIEW

Did Dr. Harline present sufficient evidence of a "colorable" constitutional claim to excuse him from the general requirement of exhausting his administrative remedies before seeking judicial review?

LIST OF ALL PARTIES

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Thomas A. Constantine, Administrator Gene R. Haislip, Dep. Asst. Admin. Mary Ellen Bittner, Admin. Law Judge	

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PETITION FOR WRIT OF CERTIORARI

Dr. Wesley G. Harline ("Dr. Harline") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 22, 1998, in order to resolve an important question of federal law that should be settled by this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition is published at 148 F.2d 1199. It is reprinted in Appendix A hereto ("App. A") at page A-1. The opinion of the United States District Court for the District of Utah, Central Division, is unpublished, but is reprinted in Appendix B hereto ("App. B") at page B-1.

JURISDICTION

Dr. Harline seeks review of the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on July 22, 1998. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the entry of said judgment. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

A. Statement of Facts

1. Dr. Harline is a licensed physician, residing and practicing medicine in the State of Utah for nearly forty-six years. (R. at 2, 4).[1]

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[1]Citations to the record shall be to the record ("R.") on appeal before the Tenth Circuit set forth in Appellant's Appendix, and denominated as "Aplt. App.". For example, reference to page two of the record below was denominated "Aplt. App. at 2," and shall be referenced as "R. at 2"

2. The United States Department of Justice, Drug Enforcement Administration ("the government"), is an executive agency within the United States Government. (R. at 2).

3. Defendant Thomas A. Constantine ("Administrator Constantine") was at all relevant times the Administrator of the DEA, serving in that capacity beginning in approximately 1994. (R. at 2).

4. Gene R. Haislip ("Deputy Haislip") was at all relevant times a Deputy Assistant Administrator in the Office of Diversion Control of the DEA. (R. at 2).

5. Mary Ellen Bittner ("ALJ Bittner" or "Judge Bittner") was at all relevant times employed as an administrative law judge in the Office of Administrative Law Judges within the DEA. (R. at 2).

6. Dr. Harline first became licensed to practice medicine in the State of Utah on February 6, 1953. (R. at 4).

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herein.

7. Dr. Harline first became licensed to prescribe controlled substances in the State of Utah in approximately 1953. (R. at 4).

8. Dr. Harline first became registered with the DEA and/or its relevant predecessors, to prescribe controlled substances in approximately 1953, and has maintained said registration for over 45 years. (R. at 4).

9. Prior to October 27, 1995, neither the DEA nor any of its relevant predecessors had ever taken any disciplinary action with respect to Dr. Harline's registration. (R. at 4).

10. On or about October 27, 1995, Deputy Haislip caused to be served on Dr. Harline an Order to Show Cause as to why the DEA "should not revoke [Dr. Harline's] DEA Certificate of Registration, AH1650248, under 21 U.S.C. § 824(a), and deny any pending applications for renewal of such registration as a practitioner under 21 U.S.C. § 823(f), for reason that [his] continued registration would be inconsistent with the public interest . . . ." (Hereinafter referred to as the

"Registration Matter"). (R. at 4-5; see also a copy of the Order to Show Cause, R. at 13-14).

11. The Order to Show Cause alleged, inter alia, the following:

a. that between 1989 and 1995, Dr. Harline failed to provide all the required information on numerous prescriptions for controlled substances;

b. that between June 1988 and February 1995, Dr. Harline prescribed various Schedule III and IV controlled stimulants to over 25 individuals "for no legitimate medical reason and not in the usual course of [his] professional practice;"

c. that between June 1988 and February 1995, Dr. Harline prescribed various Schedule III and IV controlled stimulants to over 20 individuals in violation of applicable state law; and

d. that on March 27, 1992 and September 29,

> 1993, the Division of Occupational Licensing, State of Utah, filed amended petitions seeking to revoke, suspend or otherwise restrict Dr. Harline's medical license, alleging that Dr. Harline "engaged in controlled substance abuses, including improperly prescribing diet control medications."

(R. at 5-6, 13-14).

12. A copy of the Order to Show Cause was subsequently filed with the Hearing Clerk of the Office of Administrative Law Judges in the DEA. (R. at 6).

13. Judge Bittner was assigned as the Administrative Law Judge to preside over the Registration Matter. (R. at 6).

14. On or about December 14, 1995, Dr. Harline filed a Request for Hearing on the Order to Show Cause. (R. at 6).

15. Dr. Harline later filed a Motion for Disqualification of Administrative Law Judge, requesting that

Judge Bittner disqualify herself from presiding over the hearing due to her potential bias arising from her employment with the DEA. (R. at 58, 82-85).

16. Judge Bittner denied Dr. Harline's motion, and issued her Ruling on Motion for Disqualification of Administrative Law Judge on July 3, 1996. (R. at 58, 108-09).

17. The formal administrative hearing was subsequently scheduled by Judge Bittner and was carried out in three separate segments on April 1-3, May 6-8, and August 18-21, 1997. (See R. at 115-16).

18. Dr. Harline filed suit in the U.S. District Court for the District of Utah, claiming that Judge Bittner's involvement as an employee of the DEA violated his due process right to a fair and impartial tribunal. (R. at 6-8).

19. Dr. Harline sought declaratory and injunctive relief. (R. at 9-10).

20. The government brought a motion to dismiss all

of Dr. Harline's claims. (R. at 16).

21. A hearing on the government's motion to dismiss, and on Dr. Harline's motion for temporary restraining order was conducted on March 26, 1997, just prior to the first segment of the underlying administrative hearing. (R. at 234).

22. On March 27, 1997, without any discovery ever having been completed, the district court entered an order granting the government's motion to dismiss, and denying Dr. Harline's motion for a temporary restraining order. (R. at 231, 271).

B. Basis for Federal Jurisdiction

Dr. Harline brought suit in the United States District Court for the District of Utah, challenging on due process grounds the constitutionality of the federal administrative system that allows Administrative Law Judge Mary Ellen Bittner ("ALJ Bittner" or "Judge Bittner"), an employee of the Drug Enforcement Administration ("DEA"), to preside over and conduct a formal hearing to determine whether or not Dr.

Harline's registration to prescribe controlled substances should be revoked. Dr. Harline sought declaratory and injunctive relief. The district court had jurisdiction of the case pursuant to 28 U.S.C. Section 2201 (declaratory judgments) and 28 U.S.C. Section 1331 (federal question).

On March 27, 1997, Judge David Sam, district court judge, entered a final order disposing of all claims of the parties, granting the government's motion to dismiss, and denying Dr. Harline's motion for a temporary restraining order. Dr. Harline timely filed his Notice of Appeal on April 14, 1997. The Tenth Circuit Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C.A. § 1291 (1986).

ARGUMENT

I. THE TENTH CIRCUIT'S OPINION ADDRESSES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Tenth Circuit Court of Appeals ("Tenth Circuit"), citing this Court, observed that exhaustion of administrative

remedies is not required where (1) the plaintiff asserts a colorable constitutional claim that is collateral to the substantive issues of the administrative proceedings, (2) exhaustion would result in irreparable harm, and (3) exhaustion would be futile. App. A, A-7 (citing *Mathews v. Eldridge*, 424 U.S. 312, 330-32)). The Tenth Circuit concluded that the District Court lacked subject matter jurisdiction due to Dr. Harline's apparent failure to satisfy the "colorable constitutional claim" prong of the three-part test. This Court has never defined what constitutes a colorable constitutional claim in the context of exhaustion of administrative remedies. The Tenth Circuit has even observed that the Supreme Court "has yet to consider its application in a fashion that would give us definitive guidance." *Koerpel vs. Heckler*, 797 F.2d 858, 862 (10th Cir. 1986). In *Heckler v. Ringer*, 466 U.S. 602, 609 (1984), this Court discussed the colorable collateral claim requirement, but the analysis focused on whether the claim was collateral, not whether it was colorable. Moreover, the claim

in that case was not of a constitutional nature.

As the Tenth Circuit noted, the exhaustion requirement is important.

> [It] prevents premature interference with agency processes, allowing agencies an opportunity to (1) correct their own errors, (2) afford the parties before them and reviewing courts the benefit of their experience and expertise, and (3) compile a record which is adequate for judicial review.

App. A, A-7 to A-8 (citing *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). This Court should grant this petition for the purpose of giving clear guidance on what constitutes a colorable constitutional claim that would excuse exhaustion of administrative remedies.

In addition, this Court has never entertained a *structural* constitutional challenge to the current system of federal agency adjudication that allows supposedly unbiased and impartial

agency employees to preside over formal hearings, as administrative law judges, at which their employing agency appears as one of the parties in the dispute.

II. THE TENTH CIRCUIT'S OPINION ALSO CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW SET FORTH IN PRIOR DECISIONS OF THIS COURT.

In *Withrow vs. Larkin*, 421 U.S. 35 (1975), the Court stated: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the *probability of unfairness*.'" *Withrow*, 421 U.S. at 47 (quoting *In re Murchison*, 349 U.S. 133, 136(1955)) (emphasis added).

At issue in *Murchison*, was whether a Michigan law that allowed the same judge to preside at a contempt hearing, who had also served as the "one-man grand jury" out of which the contempt charges arose, violated due process. *Murchison*, 349 U.S. at 133-35. The *Murchison* Court quoted with approval, *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), which stated that "every procedure which would offer a possible

temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Id.* at 136. The Court continued: "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way '*justice must satisfy the appearance of justice.*'" *Id.* (emphasis added)(quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). The *Murchison* Court held that it was a violation of due process for the "judge-grand jury" to try the petitioners, and therefore, it was error for the Supreme Court of Michigan to uphold their convictions.

Judge Bittner, like the decision-maker in *Murchison*, must be free from the possible temptation to favor the DEA over Dr. Harline. Even in the absence of direct evidence of *actual* bias, our courts must satisfy the appearance of justice, and thus avoid even the probability of unfairness and bias.

The *Withrow* Court observed that a due process challenge should be sustained where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47.

Dr. Harline presented abundant evidence, even without the benefit of any discovery being completed, that the probability of unfairness in the current system of agency adjudication is intolerably high. If allowed to move forward with the case, Dr. Harline may even discover evidence supporting actual bias. The district court, in its opinion referred to eight pages summarizing evidence to support Dr. Harline's constitutional claim, and concluded that based on that evidence, Dr. Harline's claim was "colorable" and at a minimum, not frivolous or wholly insubstantial. App. B, B-6 to B-7. A reproduction of these pages from Dr. Harline's Reply Memorandum in Support of Motion for Temporary Restraining Order is set forth in Appendix C hereto. App. C, C-1. Interestingly, the Tenth Circuit failed to address any of

this evidence, perhaps because it clearly supports a colorable constitutional claim. Summarized, the evidence includes:

- The Administrative Procedures Act ("APA") does not sufficiently safeguard ALJ independence;
- Draftsmen of the APA recognized that the built-in safeguards may be insufficient;
- Affidavits obtained by Dr. Harline from three former ALJs confirm: APA safeguards are inadequate; ALJs as agency employees are not impartial, unbiased, or independent; ALJ independence is substantially eroded by agency control over promotional opportunity, office space, equipment and support staff, and agency power to initiate disciplinary proceedings and recommend sanction, and even reprimand an employee ALJ; the current system "violates fundamental notions of fairness and makes it intrinsically impossible for individuals to receive a fair and impartial hearing;"
- Responding to a survey sent to 1,150 sitting ALJs,

well in excess of 50% of the ALJs stated the need for independence, need for separation from their employing agency, and the absence of an independent corps of ALJs, was a somewhat serious, or very serious problem;

- 45% of the ALJs admitted they have less independence compared to other federal judges;
- Merit Systems Protection Board cases demonstrate the extent of agency control over employee ALJs, including removal, suspension, reduction in grade, reduction in pay, or furlough for 30 days or less; and
- Agency power to reprimand an employee ALJ without MSPB approval or involvement.

Additional legal support for Dr. Harline's constitutional claim was submitted to the Tenth Circuit. Dr. Harline's Reply Brief contained a 26-page Addendum setting forth excerpts of the testimony from numerous congressional hearings in support of ALJ independence from employing agencies. This

additional evidence of a colorable constitutional claim was also largely ignored by the Tenth Circuit. Pages 8-12 of the Reply Brief discussed this additional evidence, and is set forth in the appendix hereto. App. C, C-12. Literally hundreds of ALJs have confirmed that the current system of administrative adjudication does not provide for a hearing before a fair and impartial tribunal. Furthermore, there is wide-spread support for ALJ independence from employing agencies among many professional ALJ organizations, including: the American Bar Association; Federal Bar Association; Merit Protection Board Professional Association; Federal Administrative Law Judges Conference; Association of Administrative Law Judges, Inc.; and National Conference of Administrative Law Judges.

Perhaps Judge Nahum Litt, Chief Administrative Law Judge for the U.S. Department of Labor summed it up best when he testified:

> One of the most troublesome areas impacting upon this relationship [between ALJs and their

> employing agencies] has been the direct and improper influences exerted by agencies over their administrative law judges. These continual and pervasive influences have involved roughly 850 of the 1100 judges in the system.

App. C, C-18.

In a long line of cases, the Court has excused the petitioner from exhausting available administrative remedies when the petitioner challenges the constitutionality of some feature of the agency's decision-making process. *See, e.g.*, *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979); *Mathews v. Diaz*, 426 U.S. 67 (1976); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 765-67 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954). The Court has also referred to *Eldridge* and *Salfi* as reflecting "the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed. . . ."

Califano v. Sanders, 430 U.S. 99, 109 (1977). The Tenth Circuit opinion violates the foregoing principles of judicial review. Dr. Harline has raised a colorable constitutional claim, therefore the availability of judicial review is presumed. Moreover, the evidence summarized above demonstrates that bias is much more than possible, but is in fact likely, and even probable. Indeed, the current system fails to satisfy the appearance of justice, and the probability of bias and unfairness is too high to be constitutionally tolerable.

III. THE TENTH CIRCUIT'S OPINION CONLFICTS WITH THE OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL.

The Tenth Circuit correctly noted that to determine whether a claim is colorable, it is necessary to examine its merits. App. A, A-9 (citing *Koerpel*, 797 F.2d at 863)). "A determination that a claim lacks merit, however, does not necessarily mean it is so lacking as to fail the colorable test." *Id.* Courts have struggled to apply the "colorable" test. Just when is a claim sufficiently meritorious to be deemed

colorable? This is a line drawing problem, and clearly the lower courts have differed on where to draw that line.

In this case, the Tenth Circuit concluded as follows:

> A constitutional claim in this context is not colorable if it is 'immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous.'

App. A, A-9 (quoting *Boettcher*, 759 F.2d at 722 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).[2]

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[2]The Tenth Circuit also observed:

> [d]ismissal for lack of subject matter jurisdiction because of the inadequacy of [a] federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.

App. A, A-9 (citing *Steel*, 118 S. Ct. at 1010 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666

Other courts have applied a different test. For example, the Eighth Circuit Court of Appeals, reversing the district court, held that exhaustion of administrative remedies was not required in that case because the plaintiff had shown that his constitutional claims were "not without some merit," and were therefore colorable. *Jensen v. Schweiker*, 790 F.2d 1227, 1230-31 (8th Cir. 1983). *See also Koerpel v. Heckler*, 797 F.2d 858, 862 (10th Cir. 1986)(observing that "lower courts have struggled to give meaning to the *Mathews* test with varying results"). This Court should grant certiorari in order to resolve this discrepancy among the lower courts, and give clear guidance on what constitutes a "colorable" constitutional claim.

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(1974))).

CONCLUSION

For the foregoing reasons, Dr. Harline's petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 19th day of October, 1998.

SCALLEY & READING

J. Bruce Reading
Wesley D. Hutchins

APPENDICES

APP. A: OPINION OF THE TENTH CIRCUIT COURT OF APPEALS A-1

APP. B: OPINION OF THE U.S. DISTRICT COURT, UTAH B-1

APP. C: EXCERPT OF BRIEF RELIED ON BY DISTRICT COURT; EXCERPT OF BRIEF PRESENTED TO TENTH CIRCUIT C-1

APPENDIX A

WESLEY G. HARLINE, M.D.,
a licensed physician, Plaintiff - Appellant,
v.
DRUG ENFORCEMENT ADMINISTRATION, an agency ofthe United States Government; THOMAS A. CONSTANTINE,
Administrator, Drug Enforcement Administration; GENE R. HAISLIP, Deputy Assistant Administrator, Drug Enforcement Administration; MARY ELLEN BITTNER, Administrative Law Judge, Drug Enforcement Administration, Defendants - Appellees.

No. 97-4052

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 148 F.3d 1199. July 22, 1998, Filed

Before SEYMOUR, Chief Judge, EBEL and KELLY, Circuit Judges.

OPINION:
KELLY, Circuit Judge.

Plaintiff-Appellant Wesley G. Harline, M.D., challenged the constitutionality of administrative proceedings to revoke his registration to prescribe controlled substances. He appeals from the dismissal of his procedural due process claims and from the denial of preliminary injunctive relief.

We have jurisdiction pursuant to 28 U.S.C. § 1291 and vacate the judgment and remand with instructions to dismiss all claims without prejudice for lack of subject-matter jurisdiction.

Background

The Controlled Substances Act, see 21 U.S.C. §§ 801-904, established a comprehensive regulatory framework to prevent the criminal diversion of drugs with legitimate medical purposes but high potentials for abuse. The Act requires practitioners who dispense controlled substances to register with the Attorney General. *See* 21 U.S.C. @ 822. Concomitantly, the Act authorizes the Attorney General to suspend or revoke a registration after issuing an order to show cause and holding a hearing in accordance with the Administrative Procedure Act. *See* 21 U.S.C. § 824(a), (c). The Attorney General has delegated this authority to Defendant-Appellee Drug Enforcement Administration (DEA).

Dr. Harline is a licensed physician registered by the DEA to prescribe controlled substances. In October 1995, the DEA served him with an order to show cause why his registration should not be suspended or revoked as inconsistent with the public interest. *See* 21 U.S.C. § 824(a)(4). The order to show cause alleged, among other things, that Dr. Harline (1) failed to provide the DEA required information on controlled substance prescriptions; (2) prescribed controlled substances for no legitimate medical reason, not in the usual course of his practice, and in violation of state law; and (3) is the subject of state administrative proceedings to revoke, suspend, or otherwise restrict his medical license for controlled substance prescription abuses.

Dr. Harline exercised his right under the Act and DEA implementing regulations to a hearing before an Administrative Law Judge (ALJ), and ALJ Mary Ellen Bittner (the ALJ) was assigned to preside. Before his hearing

date, Dr. Harline filed a motion for the ALJ to disqualify herself based on her alleged actual or potential bias stemming from her employment by the DEA. The ALJ denied the motion, deeming it "wholly without merit." Aplt. App. at 109.

Dr. Harline brought suit in federal district court, claiming the DEA's use of an ALJ in its employ violated his procedural due process rights to a fair and impartial tribunal. He sought injunctive relief against continuing administrative proceedings presided over by a DEA ALJ, and a declaration that the statutes and regulations allowing a DEA ALJ to preside are unconstitutional. The DEA moved for dismissal for lack of subject-matter jurisdiction and failure to state a claim. The district court concluded it had jurisdiction, but then dismissed all claims under Rule 12(b)(6), and denied preliminary injunctive relief for failure to demonstrate a likelihood of success on the merits.

Discussion

We review de novo the denial of a motion to dismiss for lack of subject-matter jurisdiction. *See Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 944 (10th Cir. 1995). If the district court lacked jurisdiction, "we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick*, 298 U.S. 435, 440, 80 L. Ed. 1263, 56 S. Ct. 829 (1936); see *Steel Co. v. Citizens for a Better Env't*, 140 L. Ed. 2d 210, 118 S. Ct. 1003, 1012-13

(1998) (holding assumption of jurisdiction to address merits violates separation of powers).

A. The Exhaustion Requirement

The DEA argues the district court erred in denying its motion to dismiss for lack of subject-matter jurisdiction due to Dr. Harline's failure to exhaust administrative remedies. *See Weinberger v. Salfi*, 422 U.S. 749, 764, 45 L.

Ed. 2d 522, 95 S. Ct. 2457 (1975) (stating finality of agency decision is "central to the requisite grant of subject-matter jurisdiction."). Dr. Harline does not dispute that he has fallen short in this regard, but argues instead that the exhaustion requirement should be waived. We disagree.

Exhaustion is waivable by an agency, as when the agency itself acknowledges further administrative proceedings would not serve its purposes. *See Salfi*, 422 U.S. at 764-67; *Bowen v. City of New York*, 476 U.S. 467, 484, 90 L. Ed. 2d 462, 106 S. Ct. 2022 (1986). The DEA obviously has not waived exhaustion here. Nevertheless, agency waiver may be, in the courts' discretion, deemed improperly withheld where the plaintiff's interest in prompt resolution is so great that deference to the agency's judgment on the utility of exhaustion is inappropriate. *See Mathews v. Eldridge*, 424 U.S. 319, 330, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994)

(explaining court waiver is not mandatory). This is so where (1) the plaintiff asserts a colorable constitutional claim that is collateral to the substantive issues of the administrative proceedings, (2) exhaustion would result in irreparable harm, and (3) exhaustion would be futile. *See Eldridge,* 424 U.S. at 330-32; *Koerpel v. Heckler*, 797 F.2d 858, 862-63 (10th Cir. 1986). The plaintiff bears the burden of establishing these elements. *See Koerpel*, 797 F.2d at 863.

B. The Requirement of a Colorable Claim

We need not address the other elements of court waiver because we agree with the DEA that, even if we were to exercise our discretion to waive exhaustion, Dr. Harline has not satisfied the essential element that his constitutional claim be colorable. The requirement that a constitutional claim be colorable to invoke federal court jurisdiction during pending administrative proceedings is well justified. The exhaustion requirement generally prevents

premature interference with agency processes, allowing agencies an opportunity to (1) correct their own errors, (2) afford the parties before them and reviewing courts the benefit of their experience and expertise, and (3) compile a record which is adequate for judicial review. *See Salfi*, 422 U.S. at 765. If the mere allegation of a denial of due process could suffice to establish subject-matter jurisdiction, then every act of an agency would be immediately judicially reviewable, undermining a statutory scheme which limits judicial review to further the above policies. *Holloway v. Schweiker*, 724 F.2d 1102, 1105 (4th Cir.), *cert. denied*, 467 U.S. 1217 (1984). Furthermore, encouraging parties to circumvent agency procedures would diminish agency effectiveness by making enforcement efforts far more complicated and expensive. *See McKart v. United States*, 395 U.S. 185, 193-95, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969).

To determine whether a claim is colorable, it is necessary to examine its merits. *See Koerpel*, 797 F.2d at 863. A determination that a claim lacks merit, however, does not necessarily mean it is so lacking as to fail the colorable test. *See id.* (citing *Boettcher v. Secretary of Health and Human Servs.*, 759 F.2d 719, 722 (9th Cir. 1985)). A constitutional claim in this context is not colorable if it is "immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous." Id. (alteration in original) (quoting *Boettcher*, 759 F.2d at 722 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83, 90 L. Ed. 939, 66 S. Ct. 773 (1946))). It has also been observed that "dismissal for lack of subject matter jurisdiction because of the inadequacy of [a] federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel*, 118 S. Ct. at 1010 (quoting *Oneida*

Indian Nation v. County of Oneida, 414 U.S. 661, 666, 39 L. Ed. 2d 73, 94 S. Ct. 772 (1974)).

Dr. Harline's verified complaint alleges the statutes and regulations that allow the ALJ to preside over his registration matter violate his procedural due process rights because the ALJ is employed by the DEA. The basic intuition underlying this claim is certainly not novel in human affairs. The Continental Congress listed among the usurpations of King George III that justified independence: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). Partially in reaction to these abuses, the Due Process Clause of the Fifth Amendment guarantees a hearing concerning the deprivation of life or a recognized property or liberty interest before a fair and impartial tribunal. See U.S. Const., amend. V; *Withrow v. Larkin*, 421 U.S. 35, 46, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). This

guarantee applies to administrative adjudications as well as those in the courts. *See Withrow*, 421 U.S. at 46-47. Dr. Harline enjoys this guarantee as the DEA does not dispute his property interest in his registration and his liberty interest in practicing medicine.

Not only is an actually biased decisionmaker a due process violation, but "'our system of law has always endeavored to prevent even the probability of unfairness.'" *Id.* at 47 (quoting *In re Murchison*, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955)). To state a due process claim for such probable unfairness, a plaintiff must sufficiently allege facts supporting a conclusion that the "risk of unfairness is intolerably high" under the circumstances of the particular case. *Id.* 421 U.S. at 58. In applying this standard, an administrative law judge enjoys a presumption of honesty and integrity, *see id.* at 47, which is only rebutted by a showing of "some substantial countervailing reason to conclude that a decisionmaker is actually biased

with respect to factual issues being adjudicated." See *Mangels v. Pena*, 789 F.2d 836, 838 (10th Cir. 1986) (applying *Withrow*). In the absence of such a showing, ALJs must be presumed to be persons "'of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow*, 421 U.S. at 55 (quoting *United States v. Morgan*, 313 U.S. 409, 421, 85 L. Ed. 1429, 61 S. Ct. 999 (1941)).

In only one paragraph of Dr. Harline's complaint did he strive to allege facts supporting his claims. He alleged that the ALJ "is an employee of the DEA, is paid by the DEA, has an office provided by and located within the DEA, is subject to job performance standards established by the DEA, and is subject to threats of removal, reprimand, deprivation of staff and/or equipment, or other reprisal if performance standards are not met, and in addition, is improperly allied or affiliated with the DEA in numerous other respects." Aplt. App. at 7, ¶ 26. Dr. Harline alleges

no facts whatsoever specific to the ALJ that would show a countervailing reason to conclude she is actually biased respecting factual issues in his registration matter. His charge against her employment relationship would apply to all ALJs, and is therefore essentially a structural challenge. For the reasons set forth below, this one-paragraph allegation that the structure of agency employment of ALJs is a countervailing reason to conclude ALJs are actually biased is so inadequate as to fail to state a colorable procedural due process claim.

Dr. Harline's argument that the structural safeguards of ALJ impartiality are inadequate was foreclosed by the Supreme Court in *Butz v. Economou*, 438 U.S. 478, 512-14, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). There, the Court considered the argument that suits for damages should be allowed against participants in administrative adjudications to deter unconstitutional conduct. The Court responded, however, that the APA "contains a number of provisions

designed to guarantee the independence of hearing examiners." *Id.* at 514. "The process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.* at 513; see 21 C.F.R. §§ 1301.41(a), 1316.41 (providing DEA adjudications be conducted, except where more specifically directed by DEA regulations, according to the APA).

In its analysis, the Court enumerated features of judicial adjudications that promote fairness: judges are insulated from political pressure, proceedings are adversarial in nature, resolution of issues is based on precedent, and any errors are correctable on appeal. *See Butz*, 438 U.S. at 512. The Court then reasoned that administrative adjudications share enough of these features that the risk of unconstitutional conduct by ALJs is insufficiently high to justify suits against them for damages. *See id.* at 512-13. No

doubt the Court was aware the ALJs of which it spoke are employees of their administrative agencies. *See* 5 U.S.C. § 3105 (directing agencies to appoint ALJs to carry out Sections 556 and 557). The Court justified its additional holding that agency officials are absolutely immune in their decision to prosecute with the observation that "the respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified." *Butz*, 438 U.S. at 516. Likewise, administrative adjudications share enough of the features of judicial adjudications that the ALJ's employment with the DEA alone cannot constitute a substantial countervailing reason to conclude she is actually biased respecting factual issues in Dr. Harline's registration matter.

The Supreme Court has held that circumstances presenting a greater risk of bias than agency employment of ALJs do not violate due process. In *Withrow*, the Court held there was no violation where adjudicators presided over

hearings on charges they themselves investigated. *See Withrow*, 421 U.S. at 54-55. In *Richardson v. Perales*, 402 U.S. 389, 408-09, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971), the plaintiff argued an ALJ's gathering of evidence did not satisfy the appearance of fairness and that a more independent ALJ should be provided. The Court rejected this argument, noting the integrity and fundamental fairness of the administrative adjudicatory system, and that the plaintiff's "advocate-judge-multiple-hat suggestion . . . would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Id.* at 410 (addressing Social Security Act, but noting procedures do not vary under APA).

In *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 97 L. Ed. 872, 73 S. Ct. 570 (1953), the respondent raised many of the issues of ALJ bias raised by Dr. Harline relating to multiple pay grades for ALJs, the filling of ALJ vacancies, and removal through reductions in

force. *See Ramspeck*, 345 U.S. at 129-30. In similar fashion, Dr. Harline contends that the minimal powers the APA leaves agencies allow them to control ALJs through compensation changes, removals, and promotions, in violation of due process. *Ramspeck* rejected the respondent's attack, explaining that the APA created a "special class of semi-independent subordinate hearing officers," in part by placing much of the regulatory power over their compensation, promotion, and tenure in the predecessor of the Merit Systems Protection Board (MSPB). *Id.* at 132. The Court went on to approve of each agency power at issue, concluding that it must be assumed the predecessor of the MSPB would prevent any abuses by agencies, given the right of ALJs to bring any abuses to that body's attention through appeal. *See id.* at 134-43.

To the extent Dr. Harline's claim rests on an argument that the numerous statutory and regulatory protections of ALJ decisional independence inadequately

separate the investigative and prosecutorial functions from adjudicative functions, his claim is also foreclosed. It is generally conceded the APA provides even greater separation in this regard than the Constitution requires. *See* 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, § 9.9, at 98 (3d ed. 1994). The Supreme Court has never held any adjudicatory regime unconstitutional on this basis. *See, e.g., Perales*, 402 U.S. at 410; *Marcello v. Bonds*, 349 U.S. 302, 311, 99 L. Ed. 1107, 75 S. Ct. 757 (1955); *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280, 283-84, 99 L. Ed. 1074, 75 S. Ct. 746 (1955); *Withrow*, 421 U.S. at 54-55; 2 Davis & Pierce, *supra*, § 9.9, at 98.

Various circuit court precedents confirm our conclusion that Dr. Harline's claim is not colorable. We have observed that the *Butz* Court "stressed that federal agency adjudication is characterized by the same degree of procedural integrity and independence as the judicial

process, and '[] these features of the judicial process tend to enhance the reliability of information and the impartiality of the decisionmaking process . . . .'" *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 589 (10th Cir. 1994) (quoting *Butz*, 438 U.S. at 512)). The Eleventh Circuit rejected a procedural due process challenge involving a hearing where an ALJ presided, declaring that ALJs are "independent adjudicators." *Sheldon v. SEC*, 45 F.3d 1515, 1519 (11th Cir. 1995) (citing 2 Davis & Pierce, *supra*, § 9.9, at 97, which notes safeguards to ensure ALJ independence). The Second Circuit addressed a challenge like Dr. Harline's, based on the appearance of unfairness stemming from agency employment of ALJs. The court recognized that the appearance standard cannot apply to ALJs, or "ALJs would be forced to recuse themselves in every case." *Greenberg v. Board of Governors of the Federal Reserve Sys.*, 968 F.2d 164, 167 (2d Cir. 1992). The Ninth Circuit heard a procedural due process challenge

alleging an ALJ was biased but refused to recuse himself and wrongfully denied a hearing. *See Hoye v. Sullivan*, 985 F.2d 990, 992 (9th Cir. 1993). The court held the plaintiff failed to state even a colorable constitutional claim and dismissed for lack of subject matter jurisdiction, noting that the plaintiff may appeal such refusals within the agency, and later seek judicial review. *See id.*

Dr. Harline cites a number of cases involving ALJ discipline in support of his argument that agencies improperly control ALJs. *See* Aplt. Brief at 20 (suspending ALJ for tardiness and improper use of government credit card); id. at 23 n.14 (removing ALJ for high rate of substantive errors, and another for insubordination, disruption, and unprofessional actions). Dr. Harline also complains that ALJs may be reprimanded without MSPB involvement for "violation of agency policies and procedures, incompetence, dereliction of duty, low productivity, insubordination, and misuse of agency

resources." Aplt. Brief at 17. We do not perceive in these matters the unconstitutionality Dr. Harline urges.

The independence of decisionmakers is often in tension with the other components of fundamental fairness--promptness and consistency of decision. *See United States v. Seluk*, 873 F.2d 15, 17 (1st Cir. 1989) (rejecting due process challenge to Sentencing Guidelines because curtailment of discretion is necessary to avoid unfairness of disparate sentences); 2 Davis & Pierce, *supra*, § 9.10, at 103. Without some agency powers over ALJs to supervise delays and the application of the same substantive standards to similarly situated parties, Dr. Harline might very well be before us claiming due process violations on these grounds. Congress has struck a balance among these values in the APA which we are not prepared to upset. Dr. Harline's additional arguments are similarly without merit, such as that agency appointment of ALJs, after prior approval of OPM, creates an improper feeling of allegiance toward the

employing agency, and that the sharing of physical facilities with DEA personnel presents a constitutionally intolerable risk of unfairness.

We realize the structural protections of ALJ independence are not perfect, and may not function as designed in every case. Still, a plaintiff must specifically allege the system's failure with respect to the ALJ in question to justify waiver of the well justified requirement that administrative remedies be exhausted. Otherwise, the elaborate system designed to ensure ALJ independence will withstand a purely structural constitutional challenge like Dr. Harline's. Dr. Harline's argument that legislation has been frequently proposed to form an independent corps of ALJs only indicates that some see room for structural improvement; it does not mean the Due Process Clause requires it. While Congress has not, and may not, agree with these proponents, Dr. Harline's charges of structural shortcoming are nevertheless more appropriately presented to

that body than the federal courts. Given our disposition based on Dr. Harline's failure to state a colorable constitutional claim, the parties' remaining arguments are moot.

VACATED and REMANDED with instructions to dismiss all claims without prejudice.

APPENDIX B

WESLEY HARLINE, Plaintiff,
vs.
UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendant.

Case No. 1:96-CV-0056-S

ORDER. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION. U.S. DISTRICT JUDGE DAVID SAM.

This matter is before the court on defendants' motion to dismiss and plaintiff's motion for a temporary restraining order. The matters are fully briefed and a hearing was held on March 26, 1997 at which all parties were represented by counsel.

The initial question before the court involves whether the court has subject matter jurisdiction over plaintiff's claims. The parties are in agreement that 42 U.S.C. § 1983 does not provide a basis for jurisdiction and plaintiff indicated a willingness to withdraw allegations under §1983.

Defendants argue that plaintiff's only remaining claim falls under 28 U.S.C. § 2201, the Declaratory Judgment Act, and that Act does not provide an independent basis for jurisdiction. Plaintiff disagrees asserting that jurisdiction is proper under 28 U.S.C. § 1331 (providing jurisdiction over federal questions) which provides an independent basis for jurisdiction. The court is not convinced by the defendants arguments and finds cases cited by the government distinguishable. See Kimball v. Callahan, 493 F.2d 564, 565, 565 n.3 (9th Cir. 1974) (given jurisdiction under 28 U.S.C. §1331, federal district court had power under 28 U.S.C. §2201 to render declaratory relief), cert. denied 419 U.S. 1019. The government cites Rivera v. United States, 924 F.2d 948 (9th Cir. 1991) (United States and its agencies have not waived immunity with respect to actions directly against the government for constitutional violations) which involved a claim for monetary damages and is therefore

readily distinguishable from plaintiff's claims for declaratory relief.

The government next argues that plaintiff must exhaust his administrative remedies, that he has not done so, and the case is therefore not properly before this court. Furthermore, defendants argue that the circuit court is the only federal court with jurisdiction over plaintiff's claims once the administrative process is complete. Defendants misconstrue plaintiff's claim. Plaintiff is not arguing about the alleged registration violations; rather, plaintiff's claim before this court is collateral to that which is the subject of the registration proceeding before the administrative agency. Plaintiff is claiming a constitutional violation stemming from the agency's decision-making process. Accordingly, the cases cited by defendants are distinguishable and § 1331 may provide jurisdiction over plaintiff's claims for declaratory relief. Analyzing plaintiff's claim in this framework, the

court will address the other jurisdictional arguments raised by defendants.

Regarding exhaustion of administrative remedies, the case of Girard v. Klopfenstein, 930 F.2d 738 (9th Cir. 1991) is instructive. Girard held that exhaustion of administrative remedies is not required when constitutional or statutory validity of debarment hearing regulations is challenged. That case is analogous to the situation presented to this court. Citing Mathews v. Eldridge, 424 U.S. 319 (1976), the 9th Circuit stated:

> the Supreme Court held that exhaustion of administrative remedies is not a prerequisite to invoking the jurisdiction of a district court when 'the constitutional claim is entirely collateral to [the] substantive claim,' [citation omitted], and raises 'at least a colorable claim that an unfavorable administrative determination would result in irreparable harm, ...

Girard, 930 F.2d at 740. The 9th Circuit has formulated a three-part test for analyzing when exhaustion of administrative remedies is not required:

> [t]he claim at issue must (1) be collateral to a substantive claim of entitlement (collaterality), (2) colorable in its showing that refusal of the relief sought will cause an injury which retroactive payments cannot remedy (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion (futility).

Id. at 741 (citations omitted). The Tenth Circuit has also interpreted the three-part Mathews test. In Koerpel v. Heckler, 797 F.2d 858 (10th Cir. 1986) the court stated the exhaustion requirements could be excused if three requirements were met: "if exhaustion would be futile, irreparable harm resulted, and a colorable constitutional claim which was collateral to the substantive claim of entitlement was raised." Id. at 862.

The Tenth Circuit has held that "the three factors--futility, irreparable harm and collaterality--must be taken together and evaluated in light of the facts of the case." Id. Plaintiff's claim that the administrative scheme violates his due process rights is certainly collateral. However, whether it is "colorable" requires additional analysis.

To determine whether plaintiff's claim is colorable the court must decide whether plaintiff's claims have merit or are wholly insubstantial or frivolous. Id. at 863.[1] Plaintiff claims that forcing him to go through the administrative process violates his right to due process because the ALJ's are employees of the agency and because of that relationship they are not and cannot be unbiased or impartial. In short, he alleges "the risk of unfairness is intolerably high." Withrow v. Larkin, 421 U.S. 35 (1975). "[Plaintiff] bears the burden of proving that his claims of infringed liberty and due process are colorable; otherwise there can be no claim of inadequate due process." Koerpel, 797 F.2d at 863. At pages 7-14 of his Reply Memorandum in Support of Motion for Temporary restraining order Plaintiff cites sufficient evidence to support his constitutional claim to establish that the claim is "colorable" and at a

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However, such a review does not necessarily lead to a determination on the merits. See Koerpel, 797 F.2d at 863.

minimum not frivolous or wholly insubstantial.

In addition, without much discussion both parties assert and assume that plaintiff does have a liberty/property interest in his ability to practice medicine. There is a presumption of irreparable injury when a constitutional violation is alleged. Plaintiff asserts that forcing him to proceed through the administrative process is itself a violation regardless of the outcome. In addition, if the DEA were to find that plaintiff's registration should be revoked, even if plaintiff could appeal the process could have a permanent stigmatizing effect on plaintiff's professional reputation and employment opportunity.

Finally, as in Girard, exhaustion of administrative remedies in this case would not assist the court in determining plaintiff's constitutional claims. Development of the record on whether plaintiff's registration should be revoked will have no effect on this court's evaluation of the constitutionality of the agency review procedures and

whether those procedures comport with the requirements of procedural due process. See Girard, 930 F.2d at 741. In addition, administrative exhaustion of the due process claim appears futile because the ALJ has made a ruling that plaintiff's claims are without merit.

Accordingly, consistent with the test reiterated and applied in Koerpel, the court finds plaintiff's allegations meet the three-part test and are sufficient to obtain jurisdiction in the federal district court. Finding that the court has jurisdiction, the court will now consider the merits of defendants' motion to dismiss and plaintiff's motion for a temporary restraining order.

Regarding plaintiff's first claim for relief, he alleges that the statutory and regulatory scheme affording him a registration hearing by an ALJ fails to provide him due process by an "impartial, unbiased, and disinterested tribunal." Complaint at Para. 25. The government argues that the standard is that "due process is violated only when

"the risk of unfairness is intolerably high." Defendants' Memorandum in Support of Motion to Dismiss at 5, citing Withrow v. Larkin, 421 U.S. at 38. Withrow further provides that "a person claiming bias on the part of an administrative tribunal 'must overcome a presumption of honesty and integrity in those serving as adjudicators.'" Id., Withrow, 421 U.S. at 47. In addition, the government cites Tenth Circuit authority that some "substantial countervailing reason," i.e., financial stake in the decision, must be demonstrated to conclude that an adjudicator is actually biased with respect to the underlying factual issues being adjudicated. See Mangels v. Pena, 789 F.2d 836, 837 (10th Cir. 1986) (applying Withrow).

Plaintiff glosses over the standards discussed above and odes not attempt to overcome the presumption of honesty and integrity. Rather, his approach is an attempt to establish the "possibility" or "probability" of unfairness. See Withrow, 421 U.S. at 46. He argues the potential bias

that may exist since the ALJ is employed by the DEA, and he argues the ALJ's decisional autonomy is not adequately protected. See Plaintiff's Memorandum in Opposition to Motion to Dismiss at 8. The court does not interpret the regulations to pose the risk plaintiff alleges. To the contrary, almost every act the agency takes must be done in conjunction with the Office of Personnel Management ("OPM").

Furthermore, the procedures outlined in the APA have been upheld by the Supreme Court. See Richardson v. Perales, 402 U.S. 389 (1971). As the government asserted in oral argument and in its briefs, there are no cases that support plaintiff's position that the risk of unfairness posed by the administrative scheme as established "is intolerably high." Quite the contrary, the cases relied on by plaintiff in support of his position, namely Girard and Koerpel, assume that a hearing before an ALJ provides due process. In addition, the regulatory scheme outlined by plaintiff and

defendants has adequate safeguards in place. The court will not restate the information contained in the parties' briefs on this point but rather incorporates the regulations contained in the CFR by reference and notes their adequacy.

While plaintiff's claims raise interesting academic questions and the affidavits submitted illustrate perceived problems with the system, neither they nor plaintiff's interpretation of the regulations and procedures present sufficient evidence that the risk of unfairness present in the administrative scheme as established is intolerably high.

As the government stated, "the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." Butz, 438 U.S. at 513. Accordingly, the court grants defendants' motion to dismiss plaintiff's first cause of action finding that the risk of unfairness in the present case is not intolerably high. See

Withrow, 421 U.S. at 58.

Plaintiff's second cause of action asserts a property interest in his ability to practice medicine, and that his ability or inability to prescribe medications is "integrally related to his medical practice." Complaint at para. 29. The parties both cite Board of Regents v. Roth, 408 U.S. 564, 572 (1972) for the due process standard applied to a liberty or property interest in plaintiff's registration and ability to practice medicine. Without much discussion, the government assumes that plaintiff does have such an interest and then goes on to address in more detail the test for determining if plaintiff's due process rights have been infringed. "[T]he concept of due process requires that a person whose property or liberty rights are threatened be accorded notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Defendants' Memorandum in Support of Motion to Dismiss at 8, citing

Spielman v. Hildebrand, 873 F.2d 1377, 1385 (10th Cir. 1989).

Here the court's analysis returns to the issues discussed above, whether the hearing procedures in place afford plaintiff the "opportunity to be heard at a meaningful time and in a meaningful manner." Id. As discussed above, the court is persuaded by the defendants' position that the statutory and regulatory scheme in place affords plaintiff these protections and opportunities. At the upcoming administrative hearing plaintiff will be permitted to be represented by counsel, testify, present witnesses and evidence, and cross-examine. In addition, if he is not pleased with the result he may appeal the decision reached. Plaintiff's position is based on nothing more than speculation.

Accordingly, the court grants defendants' motion to dismiss plaintiff's second cause of action for violation of his "occupational liberty interest."

Plaintiff's third cause of action is for permanent injunctive relief. Plaintiff wants all issues in the present litigation heard and resolved by this court before he is required to appear before an ALJ in the administrative hearing context. The six steps required to demonstrate entitlement to permanent injunctive relief are:

1) the probability of success on the merits;

2) whether the injunction will maintain the status quo or change it;

3) Whether irreparable injury will result absent an injunction;

4) whether there is an adequate remedy at law;

5) the degree of hardship to the opposed; and

6) whether the equities are in movant's favor.

Defendants' Memorandum in Support of Motion to Dismiss at 9, citing Villanueva v. Carere, 873 F.Supp. 434, 446 (D. Colo. 1994), aff'd 85 F.3d 481 (10th Cir. 1996).

Plaintiff has also moved for a temporary restraining

order ("TRO"). To qualify for TRO plaintiff is required to establish the following four elements:

1) he has a substantial likelihood of prevailing on the merits;

2) he will suffer irreparable injury if injunctive relief is denied;

3) the threatened injury outweighs the injury that the opposing party will suffer under the injunction; and

4) an injunction would not be adverse to the public interest. Country Kids 'N City Slicks, Inc. 77 F.3d 1280, 1283 (10th Cir. 1996). Given the similar requirements for obtaining permanent and/or temporary injunctive relief, the court will discuss these claims concurrently.

Regarding the first element, success on the merits, there is a difference between temporary and permanent relief. To obtain permanent injunctive relief plaintiff must actually demonstrate success on the merits. Plaintiff

maintains this is impossible at this early stage in the litigation and for that reason the motion to dismiss this claim should be denied. However, given the court's evaluation of plaintiff's constitutional claims, there is serious doubt whether plaintiff could ever carry his burden on this element. Plaintiff is taking on the whole administrative process and is basing his arguments on the "possibility" or "probability" that because the ALJ is employed by the agency investigating him and there are ties between the employer and employee, the fairness of the hearing process is jeopardized. While plaintiff has presented affidavits from former ALJ's and proffered results of relevant studies, there is no proof of bias or unfairness. And as discussed previously, plaintiff has not adequately addressed the presumption of honesty and integrity.

The first element is more forgiving when requesting temporary injunctive relief. Plaintiff need not demonstrate complete success; rather, he must demonstrate the equity of

maintaining the status quo among the parties until such time as a full adjudication of the claims can be accomplished. See Thompson v. Kerr-McGee Refining Corp., 660 F.2d 1380, 1387-88 (10 Cir. 1981). Even so, the court is not convinced that plaintiff will likely prevail on the merits. To the contrary, plaintiff's position is at best speculative and has been proven unsuccessful in similar contexts. See Sheldon v. SEC, 45 F.3d 1515, 1518-19 (11th Cir. 1995) (SEC enforcement proceedings where investigators gathered and presented evidence to an ALJ employed by SEC did not violate securities broker-dealer's due process rights). See also Greenberg v. Board of Governors of Federal Reserve, 968 F.2d 164, 167 (2d Cir. 1992) (rejecting bank directors' due process challenge to administrative proceedings in which ALJ's former law clerk, who had no decisional authority, but at most had advised ALJ on nonsubstantive issues, participated in underlying investigations). As presently postured, the law is clear that as long as administrative

agencies do not have employees serve in dual roles, they can combine investigative, adversarial, and adjudicative functions. See Sheldon, 45 F.3d at 1519.

Having determined that plaintiff has failed on the first element in each claim for injunctive relief, the court need not address the remaining elements. Nevertheless, the court notes that with respect to plaintiff's request for a TRO, the court is convinced that plaintiff's threatened injury does not outweigh the injury that the government and the public interest would suffer if the administrative scheme put in place by Congress was jeopardized or impeded in any way. Defendants' motion to dismiss plaintiff's third claim for relief is granted and plaintiff's motion for a temporary restraining order is denied.

Accordingly, the defendants' motion to dismiss plaintiff's complaint is granted and plaintiff s motion for a

temporary restraining order is denied. The case is dismissed in its entirety.

So ordered.

Dated this 27th day of March, 1997.

BY THE COURT:

David Sam [signature]
DAVID SAM
U.S. DISTRICT JUDGE

APPENDIX C

EXCERPT OF BRIEF RELIED ON BY DISTRICT COURT IN CONCLUDING DR. HARLINE HAD A COLORABLE CONSTITUTIONAL CLAIM (SEE APP. B, B-6):

III. A SYSTEM OF ADMINISTRATIVE ADJUDICATION THAT ALLOWS ALJs, WHO ARE EMPLOYEES OF THE AGENCY, TO PRESIDE OVER THE HEARING, DOES NOT AFFORD PLAINTIFF DUE PROCESS.

Defendants assert that the Administrative Procedures Act ("APA") affords Plaintiff adequate due process. Defendants' Reply Memo at 5. A myriad of authorities underscore the inaccuracy of the government's assertion. In fact, from its inception, legislators had serious doubts about the ability of the APA to adequately shield due process rights. Judge E. Earl Thomas wrote as follows:

> [after summarizing the due process safeguards built into the APA] . . . Nevertheless, the APA does not sufficiently protect judicial autonomy. As long as administrative law judges are employees of the agencies that appear before them, their independence is suspect, and the ability of an agency to exert improper influence over them is ever-threatening. The General

> Comments of the APA indicate that is draftsmen realized that the APA might very well prove insufficient. They stated that there existed a wide divergence of views on how best to separate examiners from employer agencies and '[t]he committee has . . . taken the course which it believes will suffice without being excessive. Moreover, amendatory or supplementary legislation can supply any deficiency which experience discloses in those cases.'

Judge Earl Thomas, National Conference of Administrative Law Judges, Administrative Law Judges: The Corps Issue, 1987, at 3-4 (citing Act of June 11, 1946, Pub. L. No. 79-404, U.S. Code Cong. & Ad. News (Stat.) 216)(emphasis added).[1]

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[1]Another noted scholar and ALJ has observed as follows:

> the APA does not in any way protect the decisions of the ALJs from more subtle agency influence. The APA does not, for example, address the tension between an ALJ's role as adjudicator and his association with one particular agency. Nor does it preclude an agency's discriminatory deprivation of vital secretarial services or comfortable surroundings.

Karen Y. Kauper, Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute, 18 J.L. Ref. 537, 540 (1985).

Plaintiff has interviewed several sitting and retired judges regarding the inadequacy of the alleged protections afforded under the APA. Affidavits from three former administrative law judges, including E. Earl Thomas (author of article cited above), Wilford C. Lynch, and Don Edgar Burris, are attached hereto as Exhibits "A" through "C", respectively. These individuals have combined, more than 50 years of experience judging administrative matters, and have served in both management positions over large numbers of other administrative law judges, and leadership positions in prominent professional organizations such as the National Conference of Administrative Law Judges.

Based on their personal knowledge, experience and expertise, these former judges confirm that attempts, pursuant to the APA, to insulate ALJs from improper employer influence, are not adequate. Thomas ¶ 9, Lynch ¶ 12, Burris ¶ 12. ALJs that remain agency employees are not impartial, unbiased, nor independent judges. Thomas ¶ 6, Lynch ¶¶ 8-9,

Burris ¶ 8-9. The lack of ALJ independence derives directly from the nature of the employer/employee relationship between employer agencies and employee ALJs, and includes, but is not limited to: (a) agency control over ALJ promotional opportunity; (b) agency control over ALJ office space, equipment, and support staff; (c) the employing agency may, with the approval of the Office of Personnel Management ("OPM"), appoint an individual to an ALJ position, create higher ALJ positions with higher salaries, and offer an ALJ applicant with superior qualifications a higher rate of pay;[2] (d) the employing agency may initiate disciplinary proceedings against an ALJ and recommend a desired sanction to the Merit Systems Protection Board ("MSPB"), including removal, suspension, reduction in grade, reduction in pay, or furlough for 30 days or less; (e) the employing agency may establish the

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[2]The OPM serves primarily a ministerial function, and generally approves agency decisions relating to ALJs. The OPM rarely overturns an agency decision relating to an ALJ. Thomas ¶ 8, Lynch ¶ 11, Burris ¶ 11.

ALJ's employment status during such disciplinary proceedings; (f) the employing agency actually takes the disciplinary action against the ALJ, and enforces that action, following the approval of the MSPB; and (g) the employing agency may reprimand ALJ employees, without any involvement of the Merit Systems Protection Board, for a wide variety of employment related activities, including violation of agency policies and procedures, incompetence, dereliction of duty, low productivity, insubordination, and misuse of agency resources.[3] These characteristics of the employment relationship, in practical terms, have a "chilling effect" on ALJ conduct, and substantially erode ALJ decisional independence. Lynch ¶ 9, Burris ¶ 9.

In short, ALJs are for all intents and purposes technically and practically agency employees, subject to the

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[3]Interestingly, Defendants have not even responded to or disagreed with Plaintiff's argument in his initial Memorandum that these characteristics of the employment relationship eliminate the decisional independence of ALJs.

foregoing and many other improper pressures and influences inherent in any employer/employee relationship, all of which substantially and intolerably erode the decisional autonomy of ALJs and extinguish their supposed independence from their employing agency. Thomas ¶ 9, Lynch ¶ 16, Burris ¶ 13. The ALJs interviewed by Plaintiff all conclude that "the current system that allows employee ALJs to preside over agency administrative matters, violates fundamental notions of fairness, and makes it intrinsically impossible for individuals to receive a fair and impartial hearing." Thomas ¶ 5, Burris ¶ 14, see Lynch ¶ 17.

Sitting ALJs, whose anonymity was protected, have also expressed concern regarding the constitutional inadequacy of the present system. In 1992, the Administrative Conference of the United States ("ACUS") reported on a comprehensive study of the federal administrative judiciary. Administrative Conference of the United States: Recommendations and

Reports, 1992, Vol. II.[4] A written survey was sent to 1,150 sitting ALJs,[5] to which 610 (about 53%) responded. ALJs serving at that time responded to the question of "[h]ow serious are the following problems for ALJs?" as follows:

		Very	Somewhat	Not
a.	Agency interference	17%	26%	57%
b.	Need for independence	48%	17%	35%
. . . .				
i.	Need for separation from the agency	40%	21%	40%
. . . .				
k.	Absence of independent corps of ALJs	32%	24%	45%

Id. at 1102.[6] That well in excess of 50% of the sitting ALJs

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[4]ACUS is established by statute as an independent agency of the federal government, whose stated purpose is "to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions." Id. at inside front flap.

[5]A table showing a breakdown of APA agencies and their respective number of ALJs is attached hereto as Exhibit "D".

[6]45% of the ALJs surveyed also admitted that they have less independence compared to other federal judges. Id. at 1104.

surveyed stated that the need for independence, the need for separation from their employing agency, and the absence of an independent corps of ALJs, was a somewhat serious, or very serious problem, demonstrates that our current system is flawed.

In addition, cases reported by the Merit Systems Protection Board ("MSPB") also illustrate the extent to which employing agencies endeavor to manage, supervise and in effect, control their employee ALJs.[7] See, e.g., Social Security Administration ("SSA") v. Liebling, 62 M.S.P.R. 12, 13 (1994)(agency authorized to suspend ALJ for tardiness and improper use of government credit card); SSA v. Anyel, 58 M.S.P.R. 261, 263, 269 (1993)(agency sought removal of ALJ for her alleged failure to demonstrate acceptable level of professional competence; held ALJ independence is qualified right of decisional independence); Sannier v. MSPB, 931 F.2d

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[7]ACUS itself has described MSPB procedures as a "weapon" that is used by agencies against their ALJs. Id. at 1019.

856, 858 (Fed. Cir. 1991)(MSPB given prior approval power in more serious ALJ disciplinary actions, but MSPB does not sit in judgment over all agency managerial and supervisory decisions; agency may issue reprimands against ALJs); see also James P. Timothy, Disciplinary Proceedings Against Federal Administrative Law Judges, 6 W. New Eng. L. Rev. 807 (1984)(discussing numerous other ALJ disciplinary proceedings brought before MSPB by employing agencies).

The Social Security Administration ("SSA") recently produced a document which was circulated to all ALJs employed by the agency. See Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges, January 28, 1997, a copy of which is attached hereto as Exhibit "E". This document is an example of improper attempts by an employing agency to influence the decisional independence of its employee ALJs. It purports to describe "the scope of the Agency's authority to

supervise and oversee the performance of its ALJs," id. at 1,[8] and the duty of the ALJ "to decide claims in an impartial manner, consistent with Agency policy, and not from the ALJ's status as 'judge.'" Id. at 2. The document also claims that "an agency is permitted to communicate its views to OPM concerning the compensation and promotion of ALJs as a general matter." Id. at 7-8 (citing S. Rep. No. 752, 79th Cong., 1st Sess. 29 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 47 (1946)). Moreover, "reprimands were intentionally omitted from the actions specified in [5 U.S.C.] § 7521 [which require MSPB approval], and the Agency's supervisory or disciplinary authority is not constrained in any other way." Id. at 8 (citing SSA v. Goodman, 19 M.S.P.R. 321, 328 (1984) for proposition that "Congress has not

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[8]This clearly runs afoul of established law that agencies shall not rate the performance of their ALJs, and is an obvious example of an agency's improper attempt to control employee ALJs in spite of the law. See 5 C.F.R. § 930.211 ("An agency shall not rate the performance of an administrative law judge.").

precluded the Agency from taking disciplinary actions in any particular category of cases"). Finally, the document concludes as follows:

> For the foregoing reasons, the Agency may establish reasonable administrative practices and programmatic policies that ALJs must follow, as long as the Agency does not take actions which abridge directly or indirectly, the duty of impartiality an ALJ owes the claimant when hearing and deciding claims. Examples of such practices include requiring ALJs to attend training on the Agency's policy interpretations, and to follow them, enforcing specific time and attendance requirements, and establishing production targets and similar goals, as well as quality assurance programs. Along with the authority to set these policies, of course, goes the authority to ensure that these policies are carried out and, where appropriate, i.e. where a factual basis exists, to discipline ALJs for violations of such policies.

Id. at 18.

EXCERPT OF REPLY BRIEF PRESENTED TO TENTH CIRCUIT:

A. **Dr. Harline Has Provided Much More Than the Testimony of a "Few Complainers" to Demonstrate that the Risk of Unfairness is Intolerably High.**

Dr. Harline has come forward with a great deal of evidence in support of his case, including the affidavits of three ALJs, who have testified from decades of personal experience that the system is not fair, and it does not afford litigants due process of law. (Aplt. App. at 170-75, 177-87, 189-93). One of these judges, Judge E. Earl Thomas (ret.) was an ALJ for the Department of Labor for nearly 20 years, and even served as Deputy Chief Administrative Law Judge, responsible for the supervision and management of more than 100 other ALJs. (Aplt. App. at 171). For the government to reject out-of-hand the personal experience of these judges, and then characterize them as mere "complainers" is even more offensive than it is totally inaccurate. (See Aplee Brief at 17 n.5). Many other

judges have voiced their concern about the inadequacy of the system. Well in excess of 50% of the sitting ALJs surveyed by the Administrative Conference of the United States, admitted that the need for independence, the need for separation from their employing agency, and the absence of an independent corps of ALJs, was a somewhat serious, or very serious problem. Administrative Conference of the United States: Recommendations and Reports, 1992, Vol. II (hereinafter "Administrative Conference") at 1102.[9] The

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[9]Dr. Harline discussed the findings of the Administrative Conference in more detail in Appellant's Brief at 18-19. These statistics apply to ALJs surveyed who were not serving in the Social Security Administration. If you look at the survey of all ALJs, the numbers go up significantly higher. Of all the ALJs surveyed on the question of how serious the stated problem is, the following results were obtained:

		Very	Somewhat	Not
a.	Agency interference	26%	35%	39%
b.	Need for independence	59%	19%	22%
. . . .				
i.	Need for separation from the agency	57%	22%	21%
. . . .				
k.	Absence of independent corps of ALJs	54%	22%	24%

government has never even attempted to respond to this and other clear evidence of probable bias.

In addition, hearings conducted on those occasions when bills relating to the creation of an independent corps of ALJs have been considered, provide the testimony of vastly more than just "a few complainers." As noted in Dr. Harline's initial brief, Senator Heflin, who has sponsored such bills in Congress, observed that "the independence of administrative law judges must be a vital concern . . . [and their] independence must be jealously guarded." (Aplt. Brief at 24-25 (citing Nahum Litt and Joseph J. Simeone, An Administrative Law Judge Corps: Its Value and Relation to the Traditional Justice System, 11 Whittier L. Rev. 569, 573 (1989)). Many of those individuals that have testified at Senate and House hearings, have unequivocally stated that the current system is flawed and fails to provide a fair and impartial adjudication. Given the sometimes arduous task of locating

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Id. at 1075.

and obtaining government documents, as a convenience for the Court, Dr. Harline has compiled excerpts from some of the various Congressional hearings relating to the ALJ corps issue, which are attached hereto as an Addendum.[10] As these materials confirm, literally hundreds of ALJs confirm that the current system of administrative adjudication does not provide for a hearing before a fair and impartial tribunal. Those ALJs that have testified in favor of an independent corps of ALJs, in order to ensure decisional independence, include the following:

- Ron G. Bernoski (ALJ SSA)(Adden. at 1)
- Seymour Fier (ALJ SSA)(Adden. at 1)
- John F. Markuns (ALJ Merit Systems Protection Board)(Adden. at 5)
- Christine Moore (ALJ)(Adden. at 5)
- Melford O. Cleveland (ALJ)(Adden. at 6)
- Charles N. Bono (ALJ SSA)(Adden. at 9)
- John Vittone (ALJ Dept. of Labor)(Adden. at 12)
- Victor W. Palmer (ALJ Dept. of Agriculture)(Adden. at 12)

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[10]Dr. Harline provides these materials in this form not only as a convenience to the Court, but pursuant to Rule 28(f), Federal Rules of Appellate Procedure, governing the reproduction of "statutes, rules, regulations, etc." in an addendum at the end of a brief.

- Parlen L. McKenna (ALJ Dept. of Labor)(Adden. at 13) -
- Irwin W. Coleman (ALJ)(Adden. at 14)
- Leonard Baloun (ALJ SSA)(Adden. at 17)
- Joyce Krutick Barlow (ALJ)(Adden. at 18)
- Julius Johnson (ALJ Dept. of Labor)(Adden. at 19)
- Marvin H. Morse (Chief ALJ SBA)(Adden. at 20)
- Nahum Litt (Chief ALJ Dept. of Labor)(Adden. at 20)
- William E. Fowler (Chief ALJ NTSB)(Adden. at 21)
- Edwin S. Bernstein (ALJ U.S. Postal Service)(Adden. at 22)
- Judge Borowiec (ALJ SSA)(Adden. at 23)
- Loren A. Smith (Administrative Conference Chairman)(Adden. at 24)
- Robert H. Joost (Hearing Officer, CFTC)(Adden. at 25)
- Dorothea A. Baker (ALJ)(Adden. at 25).[11]

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[11]Some ALJs from analogous state central panel systems have also testified in favor of the creation of an independent ALJ corps on the federal level. (See, e.g., Adden. at 4). The government asserts, however, that the ALJ experience on the state level is irrelevant. Experience reveals, however, that it is relevant and informative:

> There are 22 States that have now adopted the central corps system for administrative justice. Maryland was about the 12th or the 13th.
>
> More than 60 years ago, Justice Brandeis observed that it is, and I quote him, 'one of the happy incidents of the Federal system that a single courageous State may, if its citizens choose, serve as a laboratory.'

The Congressional hearings also confirm wide-spread support for ALJ independence among numerous professional ALJ organizations, and other entities:

- American Bar Association (Adden. at 4)
- Federal Bar Association (Adden. at 20)
- Merit Protection Board Professional Association (Adden. at 5)
- Federal Admin. Law Judges Conference (Adden. at 5, 12, 13, 22, 24)[12]
- Association of Administrative Law Judges, Inc. (Adden. at 6, 14, 16, 17)[13]
- National Conference of Administrative Law Judges (Adden. at 9, 12)
- American Medical Association (Adden. at 9)
- American Federation of Home Health Agencies (Adden. at 19).

Perhaps Judge Nahum Litt, Chief Administrative Law Judge for the U.S. Department of Labor summed it up best when he testified:

(Adden. at 4)(quoting John W. Hardwicke, Chief Administrative Law Judge, Office of Administrative Hearings, State of Maryland).

[12]FALJC has over 550 ALJ members, from every federal agency in the government. (Adden. at 5).

[13]The Association has a total membership of more than 600 ALJs. (Adden. at 6).

> One of the most troublesome areas impacting upon this relationship [between ALJs and their employing agencies] has been the direct and improper influences exerted by agencies over their administrative law judges. These continual and pervasive influences have involved roughly 850 of the 1100 judges in the system.

(Adden. at 21).